No. 18-18

In The Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR STATE OF MARYLAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. Private Interests Should be Weighed in the Establishment Clause Analysis When a Private Organization Transfers a Monument to a Governmental Entity in the Interests of Public Safety, but Reserves Rights to the Beneficial Use of the Monument 2

II. States Should be Able to Address the Public Safety Risks Posed by Historically Significant Monuments Without Dooming the Monuments Themselves 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

American Atheists, Inc. v. City of Detroit Downtown Development Auth., 567 F.3d 278 (6th Cir. 2009) 6

Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 4

Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) 4

Lynch v. Donnelly, 465 U.S. 668 (1984) 4

Salazar v. Buono, 559 U.S. 700 (2010) 2, 6, 7

Taylor v. Town of Cabot, 178 A.3d 313 (Vt. 2017) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 4

STATUTES

Md. Code Ann., Land Use, Title 15, subtitle 1 (LexisNexis 2017) 1

MISCELLANEOUS

Petition for Writ of Certiorari, *American Legion v. American Humanist Association* (No. 17-1717) 3

INTEREST OF AMICUS CURIAE[1]

Petitioner Maryland-National Capital Park and Planning Commission, an agency created under Maryland law that administers a regional system of parks in two of Maryland's counties,[2] owns and maintains the World War I memorial at issue in this case. Maryland has a longstanding interest in respecting and preserving the reserved property rights of the American Legion in the monument while ensuring that the Peace Cross, an historic memorial that honors members of the military from Prince George's County, Maryland, is properly maintained in a manner that ensures public safety.

SUMMARY OF ARGUMENT

I. Although the Commission owns and maintains the war memorial, a private veterans' organization continues to hold an interest in the site.

When the American Legion transferred the property to the Commission, it reserved the right to continue to use the monument for ceremonies honoring those who fell while serving their country. Those private

[1] The State of Maryland submits this brief pursuant to Supreme Court Rule 37.4. Counsel for amicus timely provided notice to counsel for Petitioner and Respondents American Legion et al. of its intent to file this brief, and on August 1, 2018, provided notice to counsel for Respondents American Humanist Association et al., who confirmed Respondents do not oppose the submission of this brief.

[2] *See* Md. Code Ann., Land Use, Title 15, subtitle 1 (LexisNexis 2017).

beneficial interests should be considered by a court in evaluating whether an Establishment Clause violation occurs when a governmental agency is deeded legal ownership of a monument in order to maintain the monument in a condition that ensures public safety.

II. There is no dispute that the Commission acquired the Peace Cross in order to ensure its maintenance, and the record reveals that the Cross has badly deteriorated over its hundred-year existence. States should have flexibility to take commonsense steps to ensure that aging monuments do not become a public safety risk without dooming the monuments themselves.

In *Salazar v. Buono*, 559 U.S. 700 (2010), this Court recognized the dilemma that a government faces when forced to choose between destroying a monument—thereby communicating disrespect for the monument and those it honors—and violating the Constitution by leaving it in place. This Court should grant the petition to resolve the dilemma recognized in *Salazar*.

ARGUMENT

I. Private Interests Should be Weighed in the Establishment Clause Analysis When a Private Organization Transfers a Monument to a Governmental Entity in the Interests of Public Safety, but Reserves Rights to the Beneficial Use of the Monument.

Although today a Maryland governmental entity owns and maintains the monument so as to preserve

public safety, the original owner, the American Legion, conditioned its transfer of the property by reserving the right to use the site to honor those who died while fighting for our country. Pet. App. 60a. The monument is used only by private parties, and only for secular purposes, and any message the monument conveys is, and always has been, *their* message and not the Commission's. The Cross was built by private parties, and it remained in private hands for 36 years until the Commission acquired the site in 1961 for the sole purpose of ensuring public safety. Pet. App. 59a-60a.

Even after title passed to the Commission, the American Legion continued to enjoy use of the site as if it were the owner. The veterans' organization retained the right to use the land to hold memorial services and ceremonies, Pet. App. 60a, and to be notified if the Cross were to be removed from the Commission's jurisdiction, so that it may "make arrangements for the care and maintenance of the Cross and the surrounding parcel." Pet. App. 60a; J.A. 2529. And the American Legion was a party to the action below—on equal footing with the Commission—which confirms that the American Legion's relationship to the monument is more than mere prior owner.

In its petition, the American Legion describes its regular, uninterrupted use of the site together with the "Bladensburg community," without pointing to any use by the Commission. *See* Petition for Writ of Certiorari, *American Legion v. American Humanist Association* at 7 (No. 17-1717). And for good reason: Although the Commission maintains the monument, "[t]here is no

evidence that the Commission consults with any churches or religious organizations to determine who may access the Memorial for events" or "that the Commission is required to be involved in any church-related activities to maintain the Memorial." Pet. App. 51a (Gregory, C.J., concurring in part and dissenting in part). Indeed, the American Legion understood that when the Commission acquired the Cross, it was doing so solely to "assume the obligation of maintaining, repairing and otherwise caring for said Cross and the land upon which it is erected." J.A. 2970.

This Court should clarify that lower courts must examine factors such as a private party's property interests in a monument before finding a First Amendment violation. In the Establishment Clause context, "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring); *see also, e.g., id.* at 679 (majority opinion) ("[T]he focus of our [Establishment Clause] inquiry must be on the [display] in . . . context[.]"); *id.* at 690 (O'Connor, J., concurring) (analogizing government religious displays to statements, and noting the importance of judging intent by "examining the context of the statement"); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (noting that a reasonable observer in Establishment Clause cases must be "deemed aware of the history and context of the community and forum" in which the speech takes place (quoting *Capital Square Review and Advisory Bd. v.*

Pinette, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring in part and concurring in judgment))). The Court should grant the petition and hold that courts should weigh any private interests in a site when evaluating whether governmental ownership creates an Establishment Clause violation.

II. States Should be Able to Address the Public Safety Risks Posed by Historically Significant Monuments Without Dooming the Monuments Themselves.

There is no dispute that the Commission's purpose in acquiring the Peace Cross site was to "preserve the monument and address traffic safety concerns." Pet. 7. Those concerns are real, and significant: The monument is a 40-foot tall concrete tower "situated on a traffic island taking up one-third of an acre at the busy intersection of Maryland Route 450 and U.S. Route 1." Pet. App. 8a. Not only must the monument remain "well lit for public safety reasons," Pet. App. 51a (Gregory, C.J., concurring in part and dissenting in part), but it requires maintenance and repairs to prevent it from falling apart. Almost a century after its construction, the Cross shows significant deterioration, including "[o]ne crack in the middle of the rear edge [that] is deep into the core concrete and has widened over time," "cracks . . . on the north arm top surfaces," possible "corrosion of reinforcing metal," and "obvious swelling within the concrete that displaces the mosaic surface outward." J.A. 1585, 1586, 1590, 1591. The threat to public safety posed by a massive concrete structure crumbling into a busy roadway below is obvious, and

governments have an interest in mitigating that threat.

As lower courts have recognized, this Court's jurisprudence permits the expenditure of state funds for non-secular purposes, including preservation and maintenance of historic structures. *See American Atheists, Inc. v. City of Detroit Downtown Development Auth.*, 567 F.3d 278, 290 (6th Cir. 2009) (holding that Detroit did not violate the Establishment Clause by including churches in a revitalization program that allowed private properties to receive municipal reimbursements for exterior refurbishments); *Taylor v. Town of Cabot*, 178 A.3d 313, 323 (Vt. 2017) (relying on *American Atheists* to uphold town's decision to award grants to historic churches for repairs).

Governments face a "dilemma" when they cannot "maintain [a] cross" without violating the Constitution, but cannot "remove the cross without conveying disrespect for those the cross was seen as honoring." *Salazar*, 559 U.S. at 716. In *Salazar*, this Court considered whether Congress's decision to transfer a cross to a private owner was consistent with an injunction prohibiting the cross from being displayed on public land. *Id.* at 708-10. Under the Court's reasoning in *Salazar*, the Commission's desire not to dishonor the Peace Cross memorial is a legitimate concern. Nevertheless, because the Court remanded the case after clarifying the appropriate standard of review, *id.* at 722, the Court did not squarely address the ultimate question of whether the Establishment Clause *requires* states to

ignore their concerns about conveying disrespect for those honored by historic memorials.

State governments need flexibility in addressing issues involving memorials that came into and must remain under public ownership because of serious public safety concerns and whose honorees deserve respect and remembrance. The Commission should be able to address the public safety risk posed by the condition of this memorial by means that do not disserve the memory of those it honors. The Court should resolve the dilemma recognized in *Salazar*.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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